93-710

Supreme Court, U.S.
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No. 93-

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

FRANK TALLEY,
Petitioner,

v.

FLATHEAD VALLEY COMMUNITY COLLEGE,
Howard L. Fryett, Dennis P. Adams, Lowell Jaeger,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MONTANA

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Montana Supreme Court, by failing to give Petitioner an opportunity to establish his "property interest" in his employment, violated the property and liberty interests established by this Court in Perry v. Sindermann, 408 US 593, 33 L.Ed.2d. 570, 92 S.Ct. 2694 (1972), and Board of Regents v. Roth, 408 US 564, 33 L.Ed.2d. 548, 92 S.Ct. 2701 (1972).

2. Whether the Montana Supreme Court, by failing to reverse the trial court's grant of summary judgment, violated summary judgment rules established by this court in Anderson v. Liberty Lobby, Inc., 477 US 242, 91 L.Ed.2d. 202, 106 S.Ct. 2505 (1986) and by the Ninth Circuit Court of Appeals in Peacock v. Duval, 695 F.2d. 644 (1982).

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

No. 93-

FRANK TALLEY,

Petitioner,

v.

FLATHEAD VALLEY COMMUNITY COLLEGE, a Community College organized by the voters of Flathead County, Montana, on April 1, 1967, according to the Community College Law of the 1965 Montana Legislative Assembly; HOWARD L. FRYETT, Individually and as President of Flathead Valley Community College; DENNIS P. ADAMS, Individually and as Dean of Educational Services of Flathead Valley Community College; LOWELL JAEGER, Individually and as the Chairman of the Division of Humanities of Flathead Valley Community College; and DOES 1 through 5, inclusive,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MONTANA

OPINION BELOW

The opinion of the Supreme Court of Montana, dated July 29, 1993 is reported at 857 P.2d 701 and is reproduced as Appendix A to this Petition.

JURISDICTION

The decision and order of the Montana Supreme Court was entered July 29, 1993, affirming the judgment of the trial court entered September 21, 1992, which judgment granted Respondents' Motion for Summary Judgment. The jurisdiction of this Court is invoked under 28 U.S.C Section 1257.

CONSTITUTIONAL AND STATUTE PROVISIONS INVOLVED

This case involves portions of the First, Fifth, and Fourteenth Amendments to the Constitution of the United States, as well as 42 USC Section 1983, which provide as follows:

> Congress shall make no law . . . abridging the freedom of speech or . . . to petition the Government for a redress of grievances.

U.S. Const. amend. I.

> No person shall be . . . deprived of life, liberty, or property without due process of law . . . .

U.S. Const. amend. V.

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law . . . .

U.S. Const. amend. XIV, Section 1.

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress . . . .

42 USC, Section 1983.

STATEMENT OF GROUNDS

1. In its decision dated July 29, 1993, the Montana Supreme Court has decided an important question of federal law in a way that conflicts with applicable decisions of this Court.

2. By its decision dated July 29, 1993, the Montana Supreme Court has decided a federal question in a way that conflicts with decisions of the United States Court of Appeals.

STATEMENT OF THE CASE

The names of all parties to this case appear in the caption of the case.

Petitioner (Talley) was a part-time instructor at the Respondent college (FVCC), having taught various philosophy courses from the fall quarter of 1982 through the winter quarter of 1989 on quarter by quarter written contracts. There was never any question concerning Talley's competency to teach and his classes consistently met curriculum

requirements.

Although he was under a written contract to teach, Talley's classes were cut from the curriculum for the winter quarter of 1989 and only reinstated after he appealed the decision to cut to the department head, the Dean of Educational Services (Respondent Adams) and, finally, to the college president (Respondent Fryett). Without apparent reason, Talley's classes were again cut for the spring quarter of 1989 and he was not offered a contract to teach. Talley again appealed the decision to cut to the department head, Dean of Educational Services and, finally, the college president. The president told Talley that his classes would be reinstated

if he obtained the signatures of twelve students willing to take the classes. Although the requisite signatures were obtained, the classes remained cut. However, the college president assured Talley that his classes would be reinstated for the summer and fall quarters of 1989.

Believing that his classes were cut contrary to the curriculum requirements established by the FVCC Board of Trustees, Talley requested a hearing on this subject in front of the Board of Trustees but was refused.

Talley next sought counsel who advised that Talley had a reasonable expectation (property interest) for the opportunity to seek continued employment at FVCC and so

advised FVCC in writing. On March 9, 1989, counsel for FVCC wrote back demanding that Talley "disavow" his legal rights. He wrote that:

> ". . . I must request that your client disavow his 'expectations of continuing employment' and acknowledge the college's discretion to determine whether to offer him part-time employment on a quarter by quarter basis. In absence of such a disavowal and acknowledgment, I must advise the college, as stated above, not to employ Mr. Talley for the summer quarter and to employ him very sparingly thereafter. "

Talley, morally outraged and shocked by the demand that he "disavow" his legal rights, filed suit against FVCC alleging a number of theories including the First, Fifth, and Fourteenth amendments to the United States Constitution and 42 USC, Section 1983.

FVCC filed a Motion for Summary Judgment on all of Talley's claims and Talley filed a Cross-Motion for Summary Judgment on some of his claims. On September 21, 1992, the State trial Court denied Talley's Motion for Summary Judgment and granted FVCC's Motion as it related to numerous of Talley's claims, including his claims based upon the First, Fifth, and Fourteenth Amendments to the United States Constitution and his 1983 claim.

The case was then appealed to the Montana Supreme Court and argued on briefs. On appeal, Talley argued, among other points, that he had acquired a property interest in his employment under the authority of Perry v. Sindermann, 408 US 593, 92 S.Ct. 2694,

34 L.Ed.2d 570 (1972) irrespective of the fact that he taught on quarter by quarter contracts. The Montana Supreme Court, citing its own case of Farris v. Hutchinson, 254 Mont. 334, 838 P.2d. 374 (1992), clearly ignored the Sindermann property interest question and affirmed the State Trial Court's grant of summary judgment on the federal question.

ARGUMENT

I. THE MONTANA SUPREME COURT, BY FAILING TO GIVE TALLEY AN OPPORTUNITY TO ESTABLISH HIS "PROPERTY" INTERESTS IN HIS EMPLOYMENT, VIOLATED THE PROPERTY AND LIBERTY INTERESTS ESTABLISHED BY THIS COURT IN PERRY V. SINDERMANN, 408

US 593, 33 L.Ed. 2d. 570, 92 S.Ct. 2694 (1972); BOARD OF REGENTS V. ROTH, 408 US 564, 33 L.Ed. 2d. 548, 92 S.Ct. 2701.

In Sindermann, and its companion case, Roth, this Court clearly pointed out that an employee can acquire "property" interests in his employment which interests subject to procedural due process protection are "not limited by a few riged, technical forms". 33 L.Ed.2d. at 580.

In this case, the Montana Supreme Court properly determined that Talley was an instructor at FVCC who had for six and a half years taught under successive written quarterly contracts, the later of which contained the following phrase:

> It is understood and agreed that acceptance of this contract confers no right on the part-time faculty member to tenure, credit toward tenure, or <u>any other permanent faculty status</u>. (Emphasis added) (857 P.2d. at 705).

However, although the Montana Supreme Court properly found that "no obligation can be implied which would result in the obliteration of a right expressly given under a written contract" (857 P.2d. at 706 and App. A., p.27), it improperly determined that "Talley has no property interest in his position because his contract clearly prohibits it; therefore, due process under the Montana or United States Constitution is not at issue." (857 P.2d. at 707 and App. A., p.30).

Although each of Talley's teaching

contracts clearly state that they "confer no . . . permanent faculty status", they do not, nevertheless, indicate that an instructor could not acquire a "property interest" in his employment so as to allow for due process protections. In Sindermann, the Respondent, Robert Sindermann, taught under a series of one year contracts. He had no guarantee of "permanent faculty status". Nevertheless, this Court found that Sindermann's "property" interests were not "limited by a few rigid, technical forms" (33 L.Ed.2d. 580) but were, instead, secured by existing "rules or mutually explicit understandings that support his claim of entitlement to the benefit and that may be invoked at a

hearing". (33 L.Ed.2d. 580).

Talley demonstrated numerous "understandings" by showing, among other factors:

A. That he was required to construct his classes for one year in advance irrespective of the fact that he taught only on quarter by quarter contracts.

B. That grants of money for innovative projects were offered to part-time instructors for use in future teaching quarters.

C. That Ed Meyers, a prior college president, had told Talley that he could expect to continue teaching in the future as long as there existed sufficient funding and adequate enrollment for his

classes.

D. That, irrespective of the wording of the quarterly contracts, instructors had been allowed to teach for years.

E. That the college's Board Policy No. 930 set out a grievance procedure, something that was denied to Talley.

F. That it was the college's past practice that curriculum changes would go through the curriculum committee whereby, in this case, Talley's classes were stricken from the curriculum and class schedule on order of the college president.

Nevertheless, the Montana Supreme Court chose to sweep all of these "understandings" away by ruling that the

wording of "Talley's contract specifically precludes any property rights" (857 P.2d. at 706). The property right cannot be denied by the wording of the employment contract. It is created by the employment circumstances. And, once that property right was created, it was entitled to due process protection and Talley was entitled to the hearing that he had requested. Mt. Healthy City School District Board of Education v. Doyle, 429 US 274, 50 L.Ed.2d. 471, 97 S.Ct. 563 (1977); Vail v. Board of Education of Paris Union School District No. 95, 706 F.2d. 1435 (1983), Affirmed, 466 US, 377, 80 L.Ed.2d. 377.

II. THE MONTANA SUPREME COURT, BY FAILING TO REVERSE THE TRIAL COURT'S GRANT OF

SUMMARY JUDGMENT, VIOLATED SUMMARY JUDGMENT RULES ESTABLISHED BY THIS COURT IN ANDERSON V. LIBERTY LOBBY, INC., 477 US 242, 91 L.Ed.2d. 202, 106 S.Ct. 2505 (1986) AND ESTABLISHED BY THE NINTH CIRCUIT COURT OF APPEALS IN PEACOCK V. DUVAL, 695 F.2d. 644 (1982).

In its decision, the Montana Supreme Court recognized that Talley had contended that he had not been rehired "because he had spoken out concerning policies of the college" (857 P.2d. at 702 and Appendix A, pages 4 and 5). Nevertheless, with this contention in mind, the Montana Supreme Court affirmed the trial court's grant of summary judgment showing that it too, like

the trial court, disbelieved not only Talley's contention regarding free speech but also the various contentions outlined on pages 14 and 15 above.

In Anderson v. Liberty Lobby, Inc., 477 US 242, 91 L.Ed.2d. 202, 106 S.Ct. 2505, this Court determined that in cases involving the exercise of constitutionally protected freedoms, the grant of summary judgment simply was insufficient to adequately protect those freedoms. It found that, in the case of a motion for summary judgment "the evidence of the non-movant is to be believed and all justifiable inferances are to be drawn in his favor". Liberty Lobby, Inc., 91 L.Ed.2d. at 216. When Talley contended

that he had not been rehired because he had spoken out concerning policies at the college, neither the trial court nor the Montana Supreme Court believed him. Furthermore, the trial court, by granting summary judgment and the Montana Supreme Court, by affirming, caused the door to Talley's opportunity to prove his contention regarding constitutionally protected freedoms to be slammed shut.

In Peacock v. Duval, 695 F.2d. 644, the Ninth Circuit Court of Appeals, in reversing the trial court's award of summary judgment adverse to a college professor held that:

> "Merely because Peacock's speech may have had the effect of irritating or even harrassing the University's Administration does

> not mean that such speech is stripped of its First Amendment Protection . . . . It will always be possible for employers to advance after the fact rationalizations for dismissals in response to the exercise of Constitutional Rights. Summary Judgment in cases such as this would mean that many instances of retaliatory firings might never reach the jury. Only a full trial can separate permissible motivations from those that merely hide unconstitutional behavior." (695 F.2d. at 647 and 648).

Thus, to deny Talley a full trial denies him, likewise, the opportunity to establish the unconstitutional behavior of FVCC. The breach of constitutional freedoms simply cannot be summarily determined and the grant of summary judgment by the trial court and its subsequent affirmation from the Montana Supreme Court was wrong.

CONCLUSION

In ruling that the language of Talley's employment contract excludes the development of a property interest, the Montana Supreme Court has not only ignored this Court's rulings in Sindermann and Roth, but has also dealt a devastating blow to Montana workers. Under the ruling, an employer could make significant representations relative to the possibility of continued employment and allow the development of other "understandings" and yet deny due process when the employment relationship is terminated.

In failing to reverse the trial court's grant of summary judgment, the Montana Supreme Court has ignored this Court's

rules concerning summary judgment in cases involving the constitionally protected freedoms as established in Liberty Lobby, Inc., and as established by the Ninth Circuit Court of Appeals in Peacock.

Petitioner respectfully urges this Court to act immediately to reverse this erroneous attitude taken by the Montana Supreme Court by granting certiorari to conduct its own review of the record below.

Respectfully submitted this 26TH day of October, 1993.

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CERTIFICATE OF SERVICE

I, Brenda Hamblin, secretary to E. Eugene Atherton, do hereby certify that on this 27th day of October, 1993, I forwarded a true and correct copy of the foregoing PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MONTANA, by first class mail, postage prepaid, upon:

Jonathan Smith
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Flathead County Courthouse
800 South Main
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Attorney for Respondents

Clerk of Montana Supreme Court
215 North Sanders, Rm. 323
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Honorable Michael H. Keedy
Flathead County Courthouse
800 South Main
Kalispell, Montana

Brenda Hamblin

APPENDICES

APPENDIX A

IN THE SUPREME COURT
OF THE STATE OF MONTANA
1993

No. 92-505

FRANK TALLEY,

Plaintiff and Appellant,

v.

FLATHEAD VALLEY COMMUNITY COLLEGE, a Community College organized by the voters of Flathead County, Montana, on April 1, 1967, according to the Community College Law of the 1965 Montana Legislative Assembly; HOWARD L. FRYETT, Individually and as President of Flathead Valley Community College; DENNIS P. ADAMS, Individually and as Dean of Educational Services of Flathead Valley Community College; LOWELL JAEGER, Individually and as the Chairman of the Division of Humanities of Flathead Valley Community College; and DOES 1 through 5, inclusive,

Defendants and Respondents.

Appeal From: District Court of the Eleventh Judicial District, In and for the County of Flathead, The Honorable Michael H. Keedy, Judge presiding.

COUNSEL OF RECORD:

For Appellant:
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Kalispell, Montana

For Respondents:
Jonathan B. Smith,
Flathead County Attorney,
Kalispell, Montana

For Amicus Montana Federation of Teachers:
Michael Dahlem
Helena, Montana

Submitted on Briefs: May 13, 1993

Decided: July 29, 1993

Filed: /s/ Edward Smith
EDWARD SMITH
Clerk

Mr. Justice Fred J. Weber delivered the Opinion of the Court.

This is an appeal from a grant of summary judgment to Flathead Valley Community College by the Eleventh Judicial District Court, Flathead County. We affirm.

We consider the following issue on appeal:

Did the District Court err in granting Flathead Valley Community College's motion for summary judgment?

This action involves a series of term contracts signed between part-time instructor, Frank Talley (Talley) and Flathead Valley Community College (FVCC).

The series of term contracts began in September of 1982 and continued throughout the winter term of 1989, constituting 24 terms at the college.

During the winter of 1989, FVCC canceled Talley's Religious Studies class and reinstated it after objections were raised by Talley. Subsequently, Talley's classes for spring term were listed but again canceled. Talley's classes were cut again during the summer and fall terms. Talley has not been rehired by the college.

Talley filed a complaint and demand for jury trial on October 10, 1989. Talley claimed that he has not been rehired because he has spoken out concerning policies at the college and in retaliation

for union activity. FVCC claims that he was not rehired because of inadequate enrollment. On November 3, 1989, Talley filed an application for Alternative Writ of Mandate. The District Court issued an alternative writ on November 15, 1989, requiring the college to either reinstate Talley to his teaching position or to show cause why it should not do so.

FVCC filed a motion to quash the writ and to dismiss the application on November 20, 1989. A hearing was held on December 21, 1989, and subsequently the court quashed the alternative writ and dismissed the application for writ of mandate. Talley again filed an application for writ of mandate which was also denied by the court

on August 9, 1991. At this time the court also denied FVCC's motion to dismiss.

The original complaint in this action contained nine counts. On February 19, 1992, Talley filed an amended complaint alleging a tenth count based upon Montana's educational tenure statute, Section 20-4-203, M.C.A. Talley claimed that the tenure statute applies to part-time instructors of community colleges.

FVCC filed a motion for summary judgment on April 3, 1992. On July 30, 1992, Talley filed a cross-motion for summary judgment concerning Counts Ten, Three, Four, and Six of his amended complaint. The court issued its Memorandum and Order September 21, 1992, granting FVCC's motion for summary

judgment as to all counts except for claims of free speech in Count Four and the attendant issues of a Section 1983 claim and attorney's fees from Count Six and Count Nine.

Upon motion of Talley, the District Court in its September 21 Order also certified an interlocutory appeal pursuant to Rule 54 (b), M.R.Civ.P.

Did the District Court err in granting Flathead Valley Community College's motion for summary judgment?

a. Statutory Tenure

Talley argues that according to Section 20-4-203, M.C.A., he has acquired tenure. According to Talley, changes in the law governing community colleges do not

preclude the tenure statute from applying to instructors at FVCC. Talley further argues that FVCC's definition of "teachers" is incorrect.

FVCC argues that the tenure statute is applicable to teachers in elementary and high school districts, but not to part-time instructors at a community college. FVCC contends that Montana has already defined "school teacher" as excluding community college instructors. Further, FVCC argues that the use of "teacher" in the tenure statute also requires that a person be certified to teach by the Department of Public Instruction and that such is not the case for instructors at FVCC.

The District Court determined that no

genuine issues of material fact were present and that FVCC was entitled to summary judgment as a matter of law. The court determined that the tenure statute did not include community college faculty. The court granted summary judgment to FVCC on the tenure question which was Count Ten of Talley's complaint.

Our standard of review for a grant of summary judgment is the same as that initially applied by the trial court under Rule 56, M.R.Civ.P. Wangen v. Kecske (Mont. 1993), 845 P.2d 721, 726, 50 St.Rep. 6, 9. Summary judgment is appropriate if no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law.

Rule 56(c), M.R.Civ.P.

The moving party has the initial burden to prove that there are no genuine issues of any fact deemed material. Wangen, 845 P.2d at 726. Once movant has met this burden, the non-moving party must present evidence that a material fact does exist. Wangen, 845 P.2d at 726. Here, Talley also moved for summary judgment on this same issue.

The District Court determined that no disputed facts existed and that FVCC, which had moved for summary judgment, was entitled to judgment as a matter of law. Talley argued to the District Court that he, not FVCC, was entitled to summary judgment as a matter of law. Thus, the

pivotal question is a matter of legal interpretation.

This is a case of first impression in Montana as this Court has not previously interpreted Section 20-4-203, M.C.A. That section provides:

> **20-4-203. Teacher tenure.** (1) Except as provided in 20-4-208, whenever a teacher has been elected by the offer and acceptance of a contract for the fourth consecutive year of employment by a district in a position requiring teacher certification except as a district superintendent or specialist, the teacher is considered to be reelected from year to year thereafter as a tenure teacher at the same salary and in the

same or a comparable position of employment as that provided by the last executed contract with the teacher unless the trustees resolve by majority vote of their membership to terminate the services of the teacher in accordance with the provisions of 20-4-204.

(2) The tenure of a teacher with a district may not be impaired upon termination of services of the teacher if the following conditions exist:

(a) the tenure teacher is terminated because the financial condition of the district requires a reduction in the number of teachers employed; and

(b) continued employment rights are provided for in a collectively bargained contract for the district. (Emphasis added).

The legislature has defined "teacher" in Chapter 20 as:

(18) "Teacher" means any person, except a district superintendent, who holds a valid Montana teacher certificate that has been issued by the superintendent of public instruction under the provisions of this title and the policies adopted by the board of public education and who is employed by the district as a member of its instructional, supervisory, or

administrative staff. This definition of a teacher shall also include any person for whom an emergency authorization of employment of such person has been issued under the provisions of 20-4-111. (Emphasis added).

Section 20-1-101, M.C.A. We consider whether Talley as an instructor at a community college is a "teacher" to whom the tenure statute applies.

Talley contends that Section 20-4-203, M.C.A., must include community college instructors because it always has and the legislature has not repealed it since it was originally codified as Section 75-6103, R.C.M., in 1971. We declined to read "community colleges" into Chapter four of

Title 20. Talley's assertion that we have previously defined "school teacher" as including those who teach in the State's system of higher eduction, citing Teamsters v. Cascade County School District No. 1 (1973), 162 Mont. 277, 511 P.2d 339, is incorrect. The Teamsters case defined who was included in the term "employees of the State." The action was one by the non-teaching employees of the State to obtain vacation time pursuant to Section 59-1001, R.C.M. (1947). Teamsters is not authority for the definition of teacher as it applies to community colleges.

The current law includes Section 20-4-203, M.C.A., and uses the word "teacher." The current definition section of Chapter

20 which defines teacher, states that a teacher is a person required to have a "teacher certificate that has been issued by the superintendent of public instruction." Section 20-1-101(18), M.C.A.

While it is true the community colleges of this State were once under the authority of OPI and were referred to as a School District, community colleges have been referred to as Community College Districts since 1979. In these Community College Districts, teaching faculty are not required to have teaching certificates issued by the OPI, although other requirements exist for employment as an instructor.

The 1979 Legislature attempted to clarify

the statutes governing community colleges by combining the statutory guidelines concerning the community colleges into one chapter of Title 20--Chapter 15:

> **Precedence of community college chapter.** Unless specifically identified in any other sections of the school laws prescribed in this title, community college districts are governed by the provisions of this chapter. Should there be a conflict between other requirements of this title and the provisions of this chapter regulating community college districts, the provisions of this chapter shall govern. (Emphasis added).

Section 20-15-402, M.C.A.

This language clearly indicates that

unless a statute in Title 20, other than in Chapter 15, specifically notes that it applies to community colleges, it does not apply to community colleges. The tenure statute is in Chapter 4 of Title 20. FVCC argues that the tenure statute does not specifically mention community colleges; therefore, it does not apply to them. We agree. Our job as a reviewing court is to interpret the laws before us -- not to add to those laws. Section 1-2-101, M.C.A.

The clear meaning of Section 20-4-203, M.C.A., is that it applies to all teachers who have been certified to teach by the Superintendent of Public Education and who teach in school districts under the authority of the OPI. Instructors at a

community college are not required to have certificates from the Superintendent and do not teach in school districts under the authority of the OPI. Community college instructors are not teachers as that term is defined in Chapter 4 of Title 20.

Because community colleges are not now governed by OPI as they once were, the Teamster case is no longer precedent for circumstances which involve community college instructors. To that extent, Teamsters is overruled. We have had occasion to consider the question of the relationship between community colleges and the word "teacher" found in Section 20-1-101 (20), M.C.A. (now Section 20-1-101(18), M.C.A.).

In Rippey v. Flathead Valley Com. College (1984), 210 Mont. 396, 682 P.2d 1363, we held that the ordinary meaning of the word "teacher" does not encompass higher education faculty, "including a community college faculty member." Rippey, 210 Mont. at 400, 682 P.2d at 1365. While the Rippey case dealt with sick leave compensation for faculty members at FVCC, the holding specifically interpreted the word "teacher" as it is used in the current Title 20 definition.

Both Rippey and the plain wording of Section 20-4-101(18), M.C.A., preclude any instructor at a community college in Montana from relying on the tenure provisions in Section 20-4-203, M.C.A.

Trustees of the community colleges have been given power by the Legislature to establish the conditions of employment of their staff and instructors pursuant to Section 20-15-225(1)(h), M.C.A. If FVCC chooses to have tenured faculty, it may establish the conditions under which that tenure is applied. Chapter 15 also contains the limitations of power with which the Legislature embued trustees:

> **Trustees to adhere to certain other laws.** Unless the context clearly indicates otherwise, the trustees of a community college district shall adhereto: . . . .

Section 20-15-404, M.C.A.

What follows is a long list of other

sections in Title 20 with which trustees of a community college must also comply. Section 20-4-203, M.C.A., is not one of them.

We conclude that Section 20-4-203, M.C.A., does not control tenure for instructors at any community college in Montana. Community colleges are unique centers for learning; they are neither high schools, nor are they part of the University System. Rippey, 210 Mont. at 397-98, 682 P.2d at 1364. Similarly, instructors teaching at these centers are also unique. Montana law specifically designates that community college districts are under the control of the Board of Regents and that community college trustees

have the power to set conditions of employment for their faculties.

We hold that the District Court did not err in granting summary judgment as to Count Ten of Talley's amended complaint.

b. Employment Arrangements, Past Practices and Property Interests.

Talley argues here that he is entitled to a "reasonable expectation of the opportunity for continuing employment." Such an expectation, argues Talley, is differentiated from his tenure argument. FVCC argues that Talley can have no such expectation because of the clear wording of his term-by-term contracts.

FVCC contended, and Talley did not deny, that every term contract signed by Talley contained the following phrase:

> It is understood and agreed that acceptance of this contract confers no right on the part-time faculty member to tenure, credit toward tenure, or any other permanent faculty status. (Emphasis added).

The wording of this phrase clearly indicates that any expectation of permanent status cannot be rooted in the term-by-term contracts which Talley has signed.

First, Talley argues that in his 1982 contract the aforementioned paragraph contained another sentence, part of which reads: "but may be renewed upon the same terms by mutual agreement, made in writing between the parties." (Emphasis added). Talley argues that because this phrase was

in his earlier contracts, that it must be read into all subsequent contracts which did not contain the wording.

Courts may not disregard the express language of contracts. New Hampshire Ins. Group v. Strecker (1990), 244 Mont. 478, 798 P.2d 130. The express wording of the contract signed by Talley indicates that the term contract cannot be the foundation for any kind of expectation of permanent employment. While he has used the phrase "opportunity for continuing employment" such a phrase is not legal and is an exercise in semantics. The essence of Talley's argument is that he was entitled to continuing employment at FVCC.

We considered a similar argument in

Farris v. Hutchinson (1992), 254 Mont. 334, 838 P.2d 374. Farris was employed under a series of term contracts prepared by the Montana University System. The last contract was effective between July , 1990, and June 30, 1991. Pursuant to a notice provision in her last contract, Farris received notice in February of 1991 that her contract would not be renewed. No reason for non-renewal was given.

Farris argued that she could show objective manifestations of job security beyond the term contract and thus, a genuine issue of material fact existed and summary judgment should not be granted. Farris, 254 Mont. at 337, 838 P.2d at 376. That is exactly the argument that Talley

makes here. He argues that he was given oral manifestations of continued employment despite the wording of his contract.

In Farris we pointed out that an agreement made in writing cannot be altered except by another writing or by an executed oral agreement. In response to the same argument as that made here by Talley, we further stated in Farris that no obligation can be implied which would result in the obliteration of a right expressly given under a written contract. Farris, 254 Mont. at 339, 838 P.2d at 377. Talley's contract is clear in regard to the very nature of his employment. No obligation can be inferred which would indicate an alteration of that agreement.

Talley further argues that he had a property right in his position as a part-time instructor at the college. Such a property interest, contends Talley, requires that he be given notice and a hearing before termination. FVCC argues that Talley did not have a property interest in his employment.

We have recognized that a property interest in one's position must be created by existing rules and regulations, state laws, or understandings between employee and employer. Medicine Horse v. Big Horn Co. School District (1991), 251 Mont. 65, 70, 823 P.2d 230, 233. In Medicine Horse, an employee argued he had a property interest in his employment despite the lack

of any such indication in his employment contract. We refused to read a property right into Medicine Horse's contract.

Unlike Medicine Horse's contract, Talley's contract specifically precludes any property right. In the face of such plain wording, Talley's subjective belief that he had a property interest in his job simply does not create such an interest. A subjective expectancy can create no constitutionally protected interest. Medicine Horse, 251 Mont. at 71, 823 P.2d at 233; citing Perry v. Sindermann (1972), 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570.

It is the Sindermann case which Talley cites for the argument that he has a

property right in his position at FVCC. He does not explain that statement, nor do we find anything in Sindermann Which confirms his analysis of the case. Sindermann merely determines that a property right in employment may be created by past practices or "mutually explicit understandings" of employer and employee. Sindermann, 408 U.S. at 601, 92 S.Ct at 2699, 33 L.Ed.2d at 580.

The manifestations that Talley indicates existed are not "objective" but are totally subjective. The clear wording in his contract precludes any objective expectation of continuing employment.

We conclude that the contract between FVCC and Talley is clear and unambiguous

on its face and creates no expectations of continuing employment with the college. FVCC met its burden by presenting the clear, unambiguous language of the contracts signed by Talley. Talley has not successfully rebutted this evidence nor shown that he is entitled to judgment as a matter of law. We hold the District Court did not err in granting summary judgment to FVCC on County One of Talley's Amended Complaint.

c. The Implied Covenant of Good Faith and Fair Dealing.

Talley argues that the various defendants here acted in violation of the covenant of good faith and fair dealing. FVCC argues that the contract between it and Talley was not breached and, therefore, the college

did not violate the covenant.

Talley did not file a cross-motion for summary judgment on this issue. Therefore, FVCC had the burden to prove that no material issue existed and it was entitled to judgment as a matter of law. It met that burden. Talley did not successfully rebut it.

Talley argued that under Montana law, the covenant of good faith and fair dealing is implied into every contract. Mann Farms, Inc. v. Traders State Bank of Poplar, Montana (1990), 245 Mont. 234, 801 P.2d 73. This is true. Thus, Talley argues that the college breached the covenant by not hiring him back.

Talley has overlooked a significant

factor: the nature and extent of the obligation of good faith and fair dealing is measured by justifiable expectations of parties. Cook v. Principal Mut. Life Ins. Co. (D.Mont. 1990), 784 F.Supp. 1513. The existence of the "no-tenure" phrase from Talley's contracts is an undisputed material fact. Despite such agreement, Talley argues he had a reasonable expectation of continuing employment. Given the plain wording of his contracts, such an expectation is not reasonable, nor is it justifiable.

Talley presents no argument which indicates a justifiable expectation in continued employment. We hold that the District Court did not err in granting

summary judgment to FVCC on Count Two of Talley's Amended Complaint.

d. Tortious Interference with a Contract Right and Constitutional Claims.

These arguments comprise Counts Three and Four of Talley's Amended Complaint. Talley filed a cross-motion for summary judgment on these two Counts. Talley argues that FVCC violated his constitutional rights under the United States and Montana Constitutions:

> No person shall be deprived of life, liberty or property without due process of law.

Art. II, Sec. 17, Mont.Const. Talley also argues equal protection, denial of due process, two issues on free speech and one

for slander, privileges and immunities under the First, Fifth and Fourteenth Amendments and a 42 USC Section 1983 claim. FVCC argues that there was no tortious interference with Talley's expectancy in continuation of his employment because of the clear wording in his contract. FVCC also contends that Section 1983 claims are not substantive claims but are based upon a deprivation of a constitutional right and Talley's rights have not been violated under the Montana or the United States Constitution.

The District Court granted FVCC's motion for summary judgment as to all issues except the free speech claims. Because most of these claims are based upon

Talley's property interest argument, we direct the reader to previous portions of this opinion and restate our prior determination: Under the facts of this case, Talley has no property interest in his position because his contract clearly prohibits it. Therefore, due process under the Montana or United States Constitution is not at issue. Further, all contracts with FVCC were successfully completed; thus, tortious interference with a contract is not an appropriate claim. Nor does the record contain evidence that others similarly situated were treated any differently than Talley in his position as part-time instructor, precluding an equal protection argument. The Privileges and

Immunity clause of the Fourth Amendment prevents discrimination by states against non-residents. The Privileges and Immunity clause of the Fourteenth Amendment protects attributes of United States citizenship and is rarely applicable. There is no privileges and immunities clause in the Fifth Amendment. Therefore, any privileges and immunities argument is also inappropriate.

However, the District Court did determine that Talley had a right to free speech which was protected by due process. The court did not determine whether this right had been violated. The claim evolved from a letter sent to Talley from FVCC during the course of legal proceedings. FVCC

there informed Talley that he would be considered for rehire in future terms only if he disavowed that he had expectations of continued employment.

The District Court denied both FVCC's and Talley's motions for summary judgment on the free speech issue attendant to Count Four of the amended complaint concerning free speech. No summary judgment being issued, that claim is still alive. Further, the Section 1983 claim cannot be considered until Talley's free speech claims are determined because a Section 1983 claim is based upon the deprivation of "rights, privileges, or immunities secured by the Constitution and laws" of the United States. 42 USC Section 1983; Dagel v. City

of Great Falls (1991), 250 Mont. 224, 819 P.2d 186.

We conclude that the only constitutional claim which has merit under the pleadings is the claim of denial of free speech according to the First Amendment to the United States Constitution and the attendant Section 1983 claim. (Count Nine alleges a claim of slander and presents a question of fact to be considered by a jury).

We hold that the District Court did not err in so determining.

e. Attorney's Fees.

The District Court determined that attorney's fees for the constitutional violations associated with 42 USC Section

1983 could not be determined until after litigation of the free speech issue. If Talley prevails on his free speech claims, the District Court determined that he would be entitled to attorney's fees. Consideration of attorney's fees is, therefore, premature at this time.

f. Injunctive Relief.

Talley argues that he is entitled to injunctive relief and rehire because he was not rehired because of his exercise of free speech. FVCC contends that there are no grounds on which injunctive relief could be granted to Talley.

The District Court determined that because Talley did not have a property interest in his position as part-time

instructor, there were no grounds for injunctive relief.

An injunction is an equitable remedy fashioned according to the circumstances of a particular case. Montana Tavern Ass'n v. State By and Through Dept. of Revenue (1986), 224 Mont. 258, 729 P.2d 1310; Section 27-19-101, M.C.A., et seq. The issuance or refusal of injunction is addressed to the discretion of the trial court. Butler v. Germann (1991), 251 Mont. 07, 822 P.2d 1067. Because Talley did not have a property interest or a right to tenure under Montana's laws, the court did not abuse its discretion in denying a grant of injunction.

We hold that the District Court did not

err in granting summary judgment to FVCC on Count Eight of Talley's amended complaint.

Affirmed

/s/ Fred J. Weber
Justice

We concur:

/s/ J.A. Turnage
Chief Justice

/s/ John Conway Harrison

/s/ William E. Hunt, Sr.

/s/ Karla M. Gray

/s/ Russell McDonough
Justices

Justice Terry N. Trieweiler did not participate.

APPENDIX B

IN THE DISTRICT COURT OF THE ELEVENTH JUDICIAL DISTRICT COURT OF THE STATE OF MONTANA IN AND FOR THE COUNTY OF FLATHEAD

Cause No. DV-93-526(B)

FRANK TALLEY,

Plaintiff,

v.

FLATHEAD VALLEY COMMUNITY COLLEGE, a Community College organized by the voters of Flathead County, Montana, on April 1, 1967, according to the Community College Law of the 1965 Montana Legislative Assembly; HOWARD L. FRYETT, Individually and as President of Flathead Valley Community College; DENNIS P. ADAMS, Individually and as Dean of Educational Services of Flathead Valley Community College; LOWELL JAEGER, Individually and as the Chairman of the Division of Humanities of Flathead Valley Community College; and DOES 1 through 5, inclusive,

Defendants.

MEMORANDUM AND ORDER

This matter is before the Court on Cross Motions for Summary Judgment. Defendants move for summary judgment on all counts of Plaintiff's Complaint. Plaintiff seeks summary judgment on Count Ten, regarding statutory tenure, and Counts Three and Four, which allege violations of liberty and property rights and due process under the Montana and U.S. Constitutions. Plaintiff concedes that summary judgment is appropriate as to Counts Five and Seven.

Plaintiff seeks monetary and injunctive relief as a result of decisions of Flathead County (sic) Community College (FVCCC)

(sic) and certain of its administrators not to hire him to teach courses on a part-time basis beginning with the spring quarter of 1989 and to date. He also seeks monetary damages against Lowell Jaeger, alleging that Jaeger made slanderous statements about him.

Count One of Plaintiff's Complaint asserts that the actions of Defendants in not hiring him were in violation of his employment arrangements, express and implied policies, and past practices of the college. Defendants seek summary judgment on this count on the basis that there is no policy or regulation granting continuing employment to part-time instructors; and, in fact, the contract by which Plaintiff

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was hired on a quarterly basis provided that "acceptance of this agreement confers no right to tenure, credit toward tenure, or any permanent faculty status. This agreement shall be for no more than one academic quarter/semester." On the other hand, Plaintiff argues that the facts support his claim that he had a "reasonable expectation for the opportunity of continued employment." Plaintiff relies upon Perry v. Sindermann (1972), 408 U.S. 593, as authority for his position that a non-tenured teacher can develop a "reasonable expectation for the opportunity of continued employment."

In Sindermann, the teacher who was not rehired had no formal contractual or

tenured security in the continued employment; however, the Supreme Court determined that the teacher's allegations raised a genuine issue as to his continued employment at the college. In particular, the teacher relied upon a provision int eh college's official faculty guide which stated, "Teacher Tenure: Odessa College has no tenure system. The Administration of the College wishes the faculty member to feel that he has permanent tenure as long as his teaching services are satisfactory and as long as he displays a cooperative attitude toward his co-workers and his superiors, and as long as he is happy in his work." Sindermann, 408 U.S. at 600. In contrast, Plaintiff has a clause in his

contract assuring him that he has no tenure or permanent faculty status. He cannot claim a reasonable expectation of continued employment, and does not present sufficient evidence to establish a genuine issue as to his interest in continued employment.

Count Two of Plaintiff's Complaint alleges a violation by Defendants of the Covenant of Good Faith and Fair Dealing. The recent case of Farris v. Hutchinson, 49 St. Rep. 717, dealt with a similar claim. The court denied Farris's claim for breach of the covenant by the defendant for not rehiring her, on the basis that her contract provided for non-renewal with adequate notice. The court held that no obligation can be implied which would

result in the obliteration of a right expressly given under a written contract. Farris, 49 St. Rep. at 719. The express clause in Plaintiff's contract that he would not acquire tenure and had no permanent faculty status precludes a claim for the breach of the Covenant of Good Faith and Fair Dealing for the college's failure to grant him continuing employment.

Count Three alleges that Plaintiff had a contractual expectancy of continued employment, and that Defendants tortiously interfered with his rights. As discussed above, the plain contractual language of Plaintiff's quarterly contracts precluded a reasonable expectation of continuing employment.

Count Four alleges that Defendants' actions violated the 1st, 5th, and 14th Amendments to the U.S. Constitution. Plaintiff's subjective expectancy of continued employment is not protected by procedural due process, because his expectancy does not rise to the level of a property right as discussed above. However, Plaintiff does have a right of free speech which is protected by procedural due process, and which he argues was violated by the college's decision not to hire him to teach any further courses unless he abandoned his belief that he had a reasonable expectation of continuing employment. Sindermann, supra.

Count Six seeks attorney's fees for the

constitutional violations of 42 USC 1983 and 1985, as provided in 42 USC 1988. Should Plaintiff prevail on his free-speech argument, he would be entitled to attorney's fees by the authority of 42 USC 1988.

Count Eight alleges that Plaintiff is entitled to injunctive relief to be reinstated to his position at the college. Even if he had a property interest in continuing employment, this would not entitle him to reinstatement. "In this case, the respondent has alleged the existence of rules and understandings, promulgated and fostered by state officials, that may justify his legitimate claim of entitlement to continued

employment absent "sufficient cause . . . Proof of such a property interest would not, of course, entitle him to reinstatement." Perry v. Sindermann, 408 US 593 at 602-3. Plaintiff has not even established a question of fact regarding a reasonable expectation of continuing employment; therefore, he is not entitled to reinstatement.

Count Nine alleges a claim of slander against Defendant Jaeger, who argues that the remarks made by him were not slanderous and were privileged because they were made during the course of an official proceeding authorized by law, Section 27-1-803, M.C.A. The statements were made during a student senate meeting. The FVCC Board of Trustees

sets policies which govern the college, and one of these policies allows there to be student government. This is not a meeting of a public authority as anticipated by Section 27-1-803, M.C.A. Jaeger also argues that the statements were not slanderous. He allegedly said that Plaintiff was attempting to mislead and dupe students for his own self interests. It is possible that such statements could tend to disqualify Plaintiff in his chosen occupation. Section 27-1-803(3), M.C.A. Questions of fact exist that must be submitted to a jury.

Count Ten concerns the issue of statutory tenure. Plaintiff alleges that he is entitled to a grant of tenure under Section

20-4-203, M.C.A. He argues that this section applies to those teaching in community colleges, and that FVCC, by retaining this services quarter after quarter, has granted him tenure. In 1979, the legislature clarified which sections of the Montana Code Annotated apply to community college districts. Section 20-4-203, M.C.A. is not included. The college does grant tenure to some full-time faculty based upon Section 20-15-225(1)(h), M.C.A., which gives the college the authority to "appoint and dismiss a president and faculty for the community college; appoint and dismiss any other necessary officers, agents, and employees; fix their compensations; and set the terms and

conditions of their employment," and Section 39-31-305, M.C.A., which gives the college the authority and imposing upon it the duty to bargain collectively with respect to wages, hours, fringe benefits, and other conditions of employment. Section 20-4-203, M.C.A. applies only to a "teacher ... in a position requiring teacher certification ..." The statutes concerning certification do not apply to community college faculty members, and Plaintiff is not required to hold a teaching certificate. In Rippey vs. Board of Trustees of Flathead Valley Community College, 210 Mont. 396, 400, 682 P.2d 1363 (1984), the Montana Supreme Court said: "We find that the plain and ordinary

meaning of "schoolteachers" does not encompass higher education faculty, including the community college faculty member." Section 20-4-203 M.C.A. does not apply to Plaintiff.

Based upon the foregoing, IT IS HEREBY ORDERED that:

1. Defendants' Motion for Summary Judgement is granted as to Counts One, Two, Three, Four with the exception of Plaintiff's free-speech claim; Five, Six except as it applies to Plaintiff's free-speech claim; Seven, Eight and Ten.

2. Defendants' Motion for Summary Judgment is denied as to Count Four regarding Plaintiff's free-speech claim and Six regarding Plaintiff's free-speech

claim, and Count Nine.

3. Plaintiff's Motion for Summary Judgment as to Counts Three, Four, and Ten is denied.

Let judgment be entered accordingly.

DATED this 21st day of September, 1992.

/s/ Michael H. Keedy

District Judge

(2)

FILED
NOV 24 1993
OFFICE OF THE CLERK

No. 93-710

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

FRANK TALLEY,
Petitioner,

vs.

FLATHEAD VALLEY COMMUNITY COLLEGE, HOWARD L. FRYETT, DENNIS P. ADAMS, LOWELL JAEGER,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MONTANA

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I.

Whether Petitioner Frank Talley had an opportunity to establish a "property interest" in his employment at the Flathead Valley Community College.

II.

Whether summary judgment was properly granted in this case, brought under 42 U.S.C. § 1983 and alleging violations of federal constitutional rights, where there were no genuine issues of material facts and the Respondents were entitled to judgment as a matter of law.

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[1] The names of all parties appear in the caption of the case.

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REPORT OF DECISION IN OTHER COURT

The decision of the Montana Supreme Court is reported at 857 P.2d 701, 50 St. Rep. 889.

CONSTITUTIONAL, STATUTORY, AND RULE PROVISIONS

In addition to the Constitutional provisions and statute set forth in the Petition the following portions of Rule 56, Montana Rules of Civil Procedure are involved in this case.

Rule 56(b), Montana Rules of Civil Procedure:

> A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

Rule 56(c), Montana Rules of Civil Procedure:

> The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

Rule 56(e), Montana Rules of Civil Procedure:

> Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

Rule 56(f), Montana Rules of Civil Procedure:

> Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

STATEMENT OF THE CASE

Petitioner Frank Talley (hereinafter, Talley) was hired to teach as a part-time instructor at Flathead Valley Community College[2] (hereinafter, the College) under a series of quarterly contracts executed between September, 1982, and December, 1988. Talley taught at the College through the end of Winter Quarter, 1989, under the contract executed in December, 1988.[3] Each contract signed by Talley included language which stated, in essence:

> It is understood and agreed that acceptance of this Agreement confers no right to tenure, credit toward tenure, or any permanent faculty status. This Agreement shall be for

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[2] The Flathead Valley Community College is a community college district which operates under the provisions of § 20-15-101, et seq., Montana Code Annotated.

[3] Talley states (Petition, at page 6) that "(a)lthough he was under written contract to teach, (his) classes were cut from the curriculum for the winter quarter" and reinstated after he appealed to the administration. One of the two classes he contracted to teach was cancelled under a contractual provision allowing cancellation for insufficient enrollment, and was reinstated after more students signed up for the class. The second class was not cancelled.

During Winter Quarter, 1989, the College determined that its budget for the remainder of the biennium, which lasted through June 30, 1989, was insufficient to allow it to offer the usual number of courses in Spring Quarter, 1989. Therefore, the College determined that it would have to build the Spring Quarter, 1989, schedule around the funds available for the remainder of the biennium. The Curriculum Committee, a standing committee at the College, developed criteria by which classes would be scheduled for Spring Quarter, 1989. The classes Talley proposed to teach were not included on the schedule under those criteria.

On February 15, 1989, Talley was informed that the classes he proposed to teach were not on the Spring Quarter, 1989, schedule. Talley then talked with the Division Chair, Respondent Lowell Jaeger; the Dean of Educational Services, Respondent Dennis Adams; and the President, Respondent Howard L. Fryett. Those discussions were held in an attempt to include the classes Talley proposed to teach on that Quarter's

schedule. On February 21, 1989, Fryett and Talley attended the Curriculum Committee Meeting at which the criteria developed by the Committee and their application to the classes recommended for an inclusion in the Spring, 1989, schedule were discussed; the Curriculum Committee did not rescind the decision concerning the classes Talley wished to have included on that schedule.

Talley, through counsel, made written demand that he be employed by the College to teach during Spring Quarter, 1989, claiming that he had a reasonable expectation for continued employment and a property right in his employment. Based upon the unequivocal provisions of the contracts he had executed, precluding "tenure, credit toward tenure, or any permanent faculty status," and restricting each contract to one quarter's duration, the College declined to execute a contract with Talley for Spring Quarter, 1989. Talley has not since been hired by the College.

Talley filed his nine-count Complaint in this matter on October 10, 1989, seeking monetary and injunctive relief as a result of the decisions of the College and certain of its administrators, not to hire him to teach courses on a part time basis beginning with Spring Quarter 1989, and monetary damages against Respondent Lowell Jaeger, alleging that Jaeger made slanderous statements concerning Talley. Count Four alleged a claim under 42 U.S.C. § 1983, averring that federal constitutional rights secured to Talley by the First, Fifth and Fourteenth Amendments to the United State Constitution, were violated by the College and its administrators.

On November 3, 1989, Talley filed an Ex Parte Application for Issuance of Alternative Writ of Mandate, averring generally that he had been deprived of public employment without good cause. An Alternative Writ, requiring the College to either reinstate Talley to his teaching position or to show cause why it should not so reinstate Talley at a hearing on December

21, 1989, was entered on November 15, 1989; following hearing on the Petition, by Order dated January 3, 1990, the district court quashed the Alternative Writ and dismissed the Application. On January 25, 1991, Talley filed a second Application for a Writ of Mandamus, essentially repeating the averments of the first Application. By Order entered on August 9, 1991, the district court denied Talley's second Application, finding no support for Talley's alleged expectations of continued employment, property interests and implied tenure.

On July 10, 1990, Talley served "Plaintiff's First Interrogatories to Defendant Flathead Valley Community College." On July 1, 1992, Talley served the "Plaintiff's Fourth Discovery Request to Defendant Flathead Valley Community College." During the intervening period, multiple discovery requests were also served on each individual Respondent, and Talley took depositions of at least seven current or former College staff members. During discovery proceedings the Respondents answered

hundreds of interrogatories and allowed inspection of thousands of pages of documents.

By Order entered February 19, 1992, the district court allowed Talley to file an Amended Complaint, which added Count Ten, an allegation that Talley had tenure under State statutory provisions.[4] On April 3, 1992, the Defendants filed their Answer to the Amended Complaint and a Motion for Summary Judgment. The motion sought summary judgment on each of the ten counts of the Amended Complaint. On July 30, 1992, Talley filed a cross-motion for summary judgment on Counts Ten, Three, Four and Six. The Respondents' motion was granted, in part, by Memorandum and Order entered on September 21, 1992. (Appendix B to Petition, page 14).[5] The grant of summary judgment included Talley's Count-Four claim that he had a property interest in his employment protected by the due process

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[4] Full-time faculty members may earn tenure at the College under the provisions of a collective bargaining agreement.

[5] In the same Order, the district court denied Talley's cross-motion in its entirety.

clause and his Count-Ten claim that he had tenure under provisions of State statute.[6] The District Court denied summary judgment with respect to that portion of Count Four which alleged violation of free speech, and Count Nine, which alleged slander.[7]

Upon Talley's motion, the district court certified an interlocutory appeal to the Montana Supreme Court of that part of the September 21, 1992, Order which granted Defendants' motion for summary judgment as to Counts One, Two, Three, Four (except as to the free speech issue), Six (except as to the free speech issue), Eight and Ten of the Amended Complaint.[8] The Montana

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[6] The statutory claim to tenure is not at issue in this Petition.

[7] Petitioner's statement (Petition, at Page 9) that the district court "granted FVCC's Motion as it related to numerous of Talley's claims, including his claims based upon the First, Fifth, and Fourteenth Amendments to the United States Constitution and his 1983 claim" is incorrect in its overbreadth. Respondents' motion for summary judgment on Talley's § 1983 claim, insofar as that claim alleged violation of his free speech, was denied by the district court (Appendix B to Petition, page 14) and, since it was not appealed, was not determined by the Montana Supreme Court. (Appendix A to Petition, page 38.)

[8] When Petitioner filed his Memorandum in Opposition to Motion for Summary Judgment in the district court, he conceded that Respondents were entitled to judgment on

Supreme Court heard the appeal and affirmed.

SUMMARY OF ARGUMENT

1. Petitioner Talley had ample opportunity to establish a "property interest" in his employment at the College.

Talley taught at the College under quarterly contracts containing explicit provisions providing that no tenure or any permanent faculty status would be granted the part-time faculty member. Talley contends that under Perry v. Sinderman, 408 U.S. 593, 92 S.Ct 2694, 33 L.Ed.2d 570 (1972) that he had a property interest in his employment protected by the due process clause of the Fifth and Fourteenth Amendments. In Sinderman and the companion case of Board of Regents v. Roth, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972), this Court determined that property interests derive from state law, rules or contracts that entitle persons to benefits; unilateral or

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Counts Five and Seven, alleging claims pursuant to 42 U.S.C. § 1985 and the Montana Wrongful Discharge From Employment Act, § 39-2-901, et seq., Montana Code Annotated, respectively.

subjective expectations of benefits are not property interests.

Though this Court recognized, in Sinderman, supra, that absence of a contract provision providing for tenure did not necessarily defeat a claim to tenure, and the consequent property interest in employment, this Court did not hold that a clear provision of a contract precluding tenure could be supplanted by "understandings" perceived by the employee to be indicative of continued employment rights.

The district court, and the Montana Supreme Court, held that under Montana contract law, the unequivocal contract provisions precluding tenure or any permanent faculty status could not be obliterated by Talley's "understandings;" those provisions precluded his establishment of a property interest in his employment.

Talley conducted broad discovery over a two-year period. He had ample opportunity to present evidence to oppose the Respondents' motion for summary judgment and to support his cross-motion for summary judgment on this issue.

The State courts properly determined that no genuine issue of material fact existed and appropriately granted summary judgment to defendant on Talley's Section 1983 claim alleging violation of the Fifth and Fourteenth Amendment due process clauses.

2. Summary judgment was property granted in this case, brought under 42 U.S.C. § 1983, and alleging violations of federal constitutional rights, because there were no genuine issues of material fact and the Respondents were entitled to judgment as a matter of law.

Talley essentially argues that summary judgment is not available to a defendant in a case in which the plaintiff has alleged a violation of 42 U.S.C. § 1983 based upon alleged violations of constitutional rights. Rule 56 (of both the Montana and Federal Rules of Civil Procedure), however, does not differentiate among types of cases in which summary judgment is available. Moreover this Court, and other courts, have recognized that summary judgment is

appropriate in cases involving alleged violations of constitutional rights when there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law.

In this case, Talley had ample opportunity to conduct discovery. He filed no affidavit, under Rule 56(f) to demonstrate a need for more discovery; indeed, he filed a cross-motion for summary judgment on the issues being considered in this petition.

The Petitioner argues that his "contentions" were not believed by the State courts and that a full trial on the merits on his claims of constitutional violations is necessary. However, Rule 56 does not allow "contentions" of the nonmoving party to be considered in determining whether genuine issues of material fact exist. The State courts properly analyzed the evidence of record, found that no genuine issues of material fact existed, and appropriately entered judgment in favor of the Respondents.

ARGUMENT

I.

Petitioner Talley had ample opportunity to establish a "property interest" in his employment at the College.

Count Four of the Amended Complaint alleged, inter alia, that the actions of the Defendants deprived Talley of property rights secured by the Fifth and Fourteenth Amendments to the United States Constitution. Talley argues that under Perry v. Sinderman, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972), he had a "property interest" in his position which gave rise to a right to a due process hearing concerning his "discharge" which the College failed to afford him. Analysis of that case, the companion case of Board of Regents v. Roth, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972), and the record in this case, however, demonstrates both that Talley had an ample opportunity to present his case on summary judgment and that he lacked a property interest in his employment.

Talley was hired to teach for 24 quarters between 1982 and 1989; each quarter of teaching was undertaken under the terms of a written contract. Provisions in each of those contracts precluded his gaining of tenure, credit toward tenure, or right to any permanent faculty status.

Commencing in July, 1990, Talley engaged in discovery from the Respondents over a period of more than two years. That discovery consisted of serving numerous interrogatories, document requests, and requests for admission, and the taking of depositions. Had Talley required more discovery in responding to the Respondents' motion for summary judgment, Rule 56(f), Montana Rules of Civil Procedure, allowed the filing of an appropriate affidavit setting forth that need. Cf., Celotex Corp v. Catrett, 477 U.S. 317, 326, 106 S.Ct. 2548, 91 L.Ed.2d 265, 276 (1986). Talley filed no such affidavit.

In deciding the cross-motion for summary judgment, the district court determined that no genuine issues of material fact existed with

respect to Talley's Count-Four property interest claim. Under the terms of the contracts Talley had signed, no property interest could be established.

Roth and Sinderman were cases in which college professors' contracts were not renewed. In Roth, the professor completed a one-year contract term in a system that recognized tenure after four years; in Sinderman, the professor had taught for ten years in a system in which, he alleged, there existed a policy implying tenure after seven years of teaching.

In Sinderman, this Court recognized that a mere subjective expectancy of continued employment is not protected by due process. Sinderman, supra, at 408 U.S. 603, 33 L.Ed.2d 580. In Roth, property interests were found to have certain attributes:

> To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a **legitimate claim of entitlement to it.** Roth,

supra, at 408 U.S. 577, 33 L.Ed.2d 561. (Emphasis supplied).

Moreover, the source of such property rights is not constitutional:

> Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law - rules or understandings that secure certain benefits and that support claims of entitlement to those benefits. Id.

Since no terms of Professor Roth's appointment, nor any state law or rule,[9] "secured . . . (an) interest in re-employment for the next year, " or "supported . . .(a) possible claim for entitlement to re-employment," Roth, supra, at 408 U. S. 578, 33 L.Ed.2d 561, he had no property interest protected by the due process clause. Not only did Talley's contracts contain no provisions which either secured an interest

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[9] As stated previously, the Montana Supreme Court also ruled in this case that Talley had no claim to tenure under Montana law.

in re-employment or supported a possible claim of entitlement to re-employment; Talley's contracts contained clear language specifically precluding any grant of tenure or continued employment rights.

In Sinderman, the district court had granted the defendants' motion to dismiss. This Court found, however, that Sinderman, in alleging the existence of a policy implying tenure after seven years of teaching, had alleged sufficient basis for tenure, and the consequent cognizable property interest in his employment, to defeat that motion. This Court did not, however, find that Sinderman had a property interest in his employment. Rather, this court stated:

> We do not now hold that the respondent has any such legitimate claim of entitlement to job tenure. For "(p)roperty interests * * * are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as

> state law. * * *. Board of Regents v. Roth, supra, at 577, 33 L.Ed.2d at 561. If it is the law of Texas that a teacher in the respondent's position has **no contractual or other claim to job tenure, the respondent's claim would be defeated.**

Sinderman, supra, at Note 7, 408 U.S. 602, 33 L.Ed.2d 580. (Emphasis supplied).

In this case, the Montana Supreme Court recognized that under Montana law "an agreement made in writing cannot be altered except by another writing or by an executed oral agreement," and that "no obligation can be implied which would result in the obliteration of a right expressly given under a written contract." (Appendix A, page 27). Since Talley's contract was "clear in regard to the very nature of his employment, . . . (n)o obligation can be inferred which would indicate an alteration of that agreement." (Id.). The Montana Supreme Court ruled, consistent with Sinderman, that "it is the law of (Montana) that a teacher in (Talley's) position has no contractual or other claim to job tenure,"

therefore defeating his claim. Sinderman, supra, at Note 7, 408 U.S. 602, 33 L.Ed.2d 580.

Talley set forth a list of "understandings" which he claims created a property interest in his employment. (Petition, at pages 14-15). Talley relies on the statement in Sinderman which acknowledged that a property interest might be based upon "rules or **mutually explicit understandings** that support his . . . claim of entitlement to the benefit . . . ." Sinderman, supra, at 408 U. S. 601, 33 L.Ed.2d 580 (emphasis supplied). However, just as "(a) written contract with an explicit tenure provision clearly is evidence of a formal understanding that supports a teacher's claim of entitlement to continued employment" (Id.), written contract provisions between the parties unequivocally precluding tenure are "mutually explicit understandings" which defeat Talley's claim of entitlement to continued employment. In light of those written contract provisions, the "understandings" listed by the Petitioner are no more than "unilateral expectations" that

he might be employed in the future.[10]

Talley conducted broad discovery for over two years before the Respondents' motion for summary judgment was decided. He did not protest, by affidavit under Rule 56(f), that insufficient discovery had been allowed; rather, he filed a cross-motion for summary judgment as to Count Four of the Amended Complaint. The district court determined that no issues of material fact existed and ruled that, under his contracts and Montana contract law, Talley had no "property interest" in his employment at the College protected by the due process clause. Talley had ample opportunity to present his case

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[10] This Court, in Sinderman, also stated that the absence of an explicit contract provision granting tenure may not always foreclose a property interest in employment. In recognizing that "(e)xplicit contract provisions may be **supplemented** by other agreements implied from 'the promisor's words and conduct in the light of the surrounding circumstances'" (Sinderman, supra at 408 U.S. 602,33 L.Ed.2d 580, emphasis supplied) this Court did not hold that explicit contract provisions may be supplanted by "promisor's words and conduct" that are inconsistent with those written provisions. Cf, Davis v. City of Chicago, 841 F.2d 186, 191 (7th Cir. 1988), in which the Court of Appeals recognized that statutes, like written contracts, could not be altered by custom or policy:

> While custom or policy may be used to **supplement** the interpretation of a statute, it cannot be used to supplant the meaning of the statute itself. (Emphasis supplied).

on summary judgment. The decision of the Montana Supreme Court was clearly consistent with this Court's decision in Sinderman, supra, and should not be reviewed by this Court.

II.

Summary judgment was properly granted in this case, brought under 42 U.S.C. § 1983, and alleging violations of federal constitutional rights, because there were no genuine issues of material fact and the Respondents were entitled to judgment as a matter of law.

In arguing that "(t)he breach of constitutional freedoms simply cannot be summarily determined," (Petition, Page 20), Talley argues, in effect, that summary judgment is not available to parties in cases brought pursuant to 42 U.S.C. § 1983 when constitutional violations are alleged. That contention is without merit.

Rule 56(b) allows a party against whom a claim is asserted to move at anytime, "for a summary judgment in the party's favor as to all or any part thereof." Rule 56(c), Montana Rules

of Civil Procedure, states in pertinent part:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

Those rules are identical to Rules 56(b) and 56(c), Federal Rules of Civil Procedure. Neither Rule 56, nor any rule of law, precludes the use of summary judgment proceedings in Section 1983 cases.

In Celotex Corp v. Catrett, supra, the plaintiff was unable, after a motion for summary judgment was filed by defendant, to produce evidence tying her claim for her husband's wrongful death to exposure to the products manufactured by the defendant. The defendant was unable to negate her claim; i.e., to demonstrate that the plaintiff's decedent was never exposed to its products. In concluding that summary judgment is appropriate where

plaintiffs cannot bring forth evidence to establish an essential element of their claims, this Court stated as follows:

> Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed "to secure the just speedy and inexpensive determination of every action." . . . Rule 56 must be construed with due regard not only for the rights of persons asserting claims and defenses that are adequately based in fact to have those claims and defenses tried to a jury, but also for the right of persons opposing such claims and defenses to demonstrate in the manner provided by the Rule, prior to trial, that the claims and defenses have no factual basis. Id., at 477 U.S. 327, 91 L.Ed.2d 276.

This court has also recognized the use of summary judgment proceedings in civil rights cases. In Scheuer v. Rhodes, 416 U.S. 232, 250, 94 S. Ct. 1683, 40 L.Ed.2d 90, 104 (1974), a case brought under 42 U.S.C. § 1983, the

district court granted defendants' motion to dismiss, finding that they were absolutely immune, and the court of appeals upheld that dismissal; this Court reversed, holding that absolute immunity did not apply, and concluded that "further proceedings, **either by way of summary judgment** or by trial on the merits, are required." (Emphasis supplied). In Butz v. Economou, 438 U.S. 478, 508, 98 S.Ct. 2894, 57 L.Ed.2d 895, 917 (1978), this Court stated:

> (D)amages suits concerning constitutional violations need not proceed to trial, but can be terminated on a properly supported motion for summary judgment based on the defense of immunity.

Likewise, in Harlow v. Fitzgerald, 457 U.S. 800, 808, 102 S.Ct. 2727, 73 L.Ed.2d 396, 404 (1982) this court recognized that civil rights suits can be determined on motions for summary judgment. In that case, this Court went on to conclude that the subjective component of the good faith, or qualified immunity, defense should be removed because it "frequently has

proved incompatible with our admonition in Butz that insubstantial claims should not proceed to trial." Id., at 457 U.S. 815-816, 73 L.Ed.2d 409. In Davis v. City of Chicago, supra, the Court of Appeals affirmed judgment for the City in a 42 U.S.C. § 1983 case similar to the case at bar. There the plaintiff, a probationary employee, claimed a property interest in his employment, but the district court, on summary judgment, concluded that he had no property interest and, therefore, no right to notice and hearing prior to termination of his employment. The foregoing cases demonstrate that the use of summary judgment proceedings in cases alleging violations of constitutional rights is not only appropriate, but encouraged.

Talley cites two cases in support of his argument on this issue: Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202, (1986) and Peacock v. Duval, 694 F.2d 644 (9th Cir. 1982). Those cases do not support the petitioner's argument that summary judgment is inappropriate in cases involving

constitutional rights.

Liberty Lobby did not involve a constitutional violation. It was a libel case in which this Court ruled that in determining whether material issues of fact existed in summary judgment proceedings, lower courts should apply the test for granting a directed verdict (i.e., whether the evidence is sufficient to sustain a verdict for the non-moving party), and should assess the sufficiency of the evidence according to the evidentiary burden imposed by the controlling substantive law. This Court did not, in that case, determine that summary judgment was insufficient to adequately protect constitutionally protected freedoms or place any restrictions on the use of summary judgment in constitutional violation cases.

In Liberty Lobby, this Court did state, as Talley points out (Petition, at page 18), that, on summary judgment, "(t)he evidence of the nonmovant is to be believed and all justifiable inferences are to be drawn in his favor." Id.,

at 477 U.S. 255, 91 L.Ed.2d 216. After citing that statement, Talley goes on to complain that the State courts did not believe his "contentions." But it is evidence, not contentions, which establishes genuine issues of material fact. Rule 56(e) states, in pertinent part:

> "When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations . . . of . . . (his) pleading, but the adverse party's response . . . must set forth specific facts showing that there is a genuine issue for trial."

Talley's "contentions" cannot create a genuine issue of material fact.

In Peacock, the court of appeals found that material issues of fact concerning the plaintiff's free speech claim, involving the intent and motivation of the defendants, precluded a grant of summary judgment. Those factual issues were based on documentary evidence produced by the plaintiff, not on the plaintiff's contentions.

In the case at bar, in considering whether Talley had a property interest in his employment, the State courts did not, as Talley argues, (Petition, at p. 18) disbelieve "the various contentions outlined on pages 14 and 15 above," (his list of "understandings" which he claims gave rise to a property right in his employment). Likewise, no element of "disbelief" entered into the decision granting summary judgment on that issue. Rather, the State courts considered the evidence of record and, finding that no genuine issue of material fact existed, properly concluded, as a matter of law under Montana statutes and the provisions of the contracts executed by Talley, that no job tenure or property interest in his employment existed; therefore, summary judgment for Respondents was appropriately entered.

CONCLUSION

There are no grounds for review of the Montana Supreme Court's decision in this case. The federal questions determined in that decision do not conflict with this Court's

rulings in Perry v. Sinderman, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972), and Board of Regents v. Roth, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972). Neither is there a conflict with the decision of the Court of Appeals for the Ninth Circuit in Peacock v. Duval, 694 F.2d 644 (9th Cir. 1982); rather, in this case the grant of summary judgment was properly affirmed because no genuine issues of material fact existed and the Respondents were entitled to judgment as a matter of law.

For these reasons, the Petition for Writ of Certiorari filed in this case should be denied.

DATED this 23rd day of November, 1993.

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No. 93-710

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

FRANK TALLEY,
Petitioner,

v.

FLATHEAD VALLEY COMMUNITY COLLEGE,
Howard L. Fryett, Dennis P. Adams, Lowell Jaeger,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MONTANA

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

ARGUMENT

I. RESPONDENT'S ARGUMENT NO. I CONTAINS FALSE AND/OR MISLEADING STATEMENTS, ARGUES DISPUTED FACTS AS IF THERE WERE NO DISPUTATION, AND SETS UP A FALSE ISSUE.

A. FALSE AND/OR MISLEADING STATEMENTS

Regarding the Sindermann property right issue presently before this Court, it must be pointed out that ever since the beginning of this litigation, the Respondent College's (FVCC) counsel has misrepresented the Petitioner's (Talley) claim, realizing that this false position violates the contractual language. The trial Court, as well as the Montana Supreme

Court, bought into that understanding, rather than relying on Talley's own testimony of what his claim is.

The past practice of FVCC for over twenty years has been to allow part-time instructors to offer courses subject to student enrollment and available funding. Under Sindermann, Talley never demanded tenure/permanent employment, but simply the opportunity for employment that has been and is being provided to all other part-time instructors at the College.

In addition to Talley's various affidavits, there exists in the record the sworn testimony of one present and one former FVCC administrator regarding the legitimate expectation of an opportunity

for continuing employment. At an unemployment compensation hearing, where FVCC could successfully defend itself against a claim if it could show that the instructor might be returning to work after the summer quarter, the administrator stated of the instructor involved that, " . . . she should be expecting that she would be able to come back and teach quarter to quarter."

Likewise a former Dean and President was deposed and testified as to what the position of the College was regarding contract language and practice during all the years he was an administrator. His testimony clearly shows that Talley's beliefs regarding employment opportunities

were not merely subjective, but rather met the objective test of Sindermann.

It is obvious that there are disputed facts regarding what the practice and understanding of FVCC has been regarding employment rights for part-time instructors. And the Montana Supreme Court has previously held that,

> "Summary judgment is never an appropriate substitute for a trial if a factual controversy exists." Frazer vs. Valley County School District No. 2, 846 P.2d., 367, 369 (1993).

The lower courts, relying solely on the interpretation of FVCC's counsel for the putative current understanding of the contract language, and of FVCC's counsel's version of Talley's claim, granted summary judgment on all of Talley's lawsuit where

this issue could be made to fit.

But there has never been any evidence before the lower courts that Talley's claim was inconsistent with contract language. There was never any sworn testimony relied on by the Respondents regarding the issues for which summary judgment was granted. FVCC's counsel's arguments are not evidence, and for the purposes of summary judgment, should never have been allowed to outweigh the sworn testimony of three individuals to the contrary.

B. DISPUTED FACTS

In numerous instances, both when moving for Summary Judgment, and on appeal, the Respondents argued disputed facts as if there were no controversy. In every

instance, Talley pointed this out to the lower courts, by introducing into evidence the relevant testimony from depositions, discovery documents, or official College records that contradicted FVCC's version. This tactic of the Respondents has now been continued before this Court.

For example, Talley claims that he was removed from the Spring 1989 schedule by a vindictive Dean as a retaliation for Talley's previous speech which was critical of the administration. (The Montana Supreme Court recognized that this was Talley's contention. See Petition, Appendix A, pages 4 and 5).

Obviously, FVCC does not want to admit to that impermissible behavior. Naturally, it

has to advance a legitimate reason for refusing to hire Talley for the first time in over six years. So to both lower Courts and now at p. 2 of its Respondent's Brief, FVCC once again states,

> "The Curriculum Committee, a standing committee at the College, developed criteria by which classes would be scheduled for Spring Quarter, 1989. The classes Talley proposed to teach were not included on the schedule under those criteria."

This explanation, if believed, would hide unconstitutional behavior. But it is a disputed fact.

Talley introduced into evidence before both lower courts, the deposition of Respondent Adams' secretary:

> Q. . . . in the prior quarter Talley had raised some cane and

possibly raised some action at the administrative level, and then along came the Spring quarter and he was just canceled, period, outright. Did anyone discuss, talk about, tell suggest why Talley's classes were sticken from the Spring schedule you have in your hands.

A. No. We were just told to do it.

Q. As a body who sits on the Curriculum Committee meetings, are you of the opinion that there's a criteria for adding deleting, etc., classes?

A. Yes

Q. Do you know whether any of those criteria were complied with before Talley's two classes were stricken in the Spring Quarter

of 1989?

A. We just did as we were told. We didn't go and check to make sure everything matched.

A similar false statement occurs on p. 3 of Respondent's Brief.

> Talley, through counsel, made written demand that he be employed by the College to teach during the Spring Quarter, 1989 .

Talley's counsel never made that demand; but only that Talley be given the opportunity based on the criteria, and that Talley not be discriminated against.

C. FALSE ISSUE

Talley's argument no. I in his Petition claims that the Montana Supreme Court failed to give him an opportunity to

establish his property interests. It did this, of course, by denying him a trial wherein these multifarious disputed facts could be weighed by a jury.

The Respondents however, in what can only be seen as an effort to befuddle this Court, invent a non-existent issue: i.e., that Talley has cried foul because he needed more time to conduct discovery. Nowhere, ever, and certainly not in his Petition, did Talley take any such position. He was more than ready to go to trial two years ago.

All Talley is contending is that the Montana Supreme Court has not ruled in compliance with established Montana and Federal principles or case law regarding

summary judgment.

The Montana Supreme Court has previously stated:

> "Summary judgment is therefore not a proper tool for resolving disputed issues of fact and is accordingly improper whenever a factual matter is in dispute. (Citations omitted) Moreover the party opposing the Motion ... will be indulged to the extent of all inferences which may be reasonably drawn from the record." (Jenkins v. Hillard, 647 P.2d., 354, 356 (1982)).

There is no way imaginable that this case was properly determined in compliance with those principles.

II. RESPONDENT'S ARGUMENT NO. II SETS UP A FALSE ISSUE AND CONTAINS FALSE AND/OR MISLEADING STATEMENTS.

A. FALSE ISSUE

On p. 20 of their Brief, the Respondents once again resort to interpolating their own understanding of Talley's position: "Talley argues, in effect, that summary judgment is not available . . . when constitutional violations are alleged." Talley never said that. But even if he had, and was in error, it makes no difference. For no matter what issues are involved, he was entitled to have his evidence believed. (Anderson v. Liberty Lobby, Inc., 477 US 242, 91 L.Ed2d., 202, 106 S.Ct. 2505: 91 L.Ed.2d. at 216).

B. FALSE AND/OR MISLEADING STATEMENTS

Respondents next seize on the Petitioners use of the word "contentions" and observe

that " . . . it is evidence, not contentions, which establishes genuine issues of material fact." (Respondents Brief, p. 26).

The "understandings" or "contentions" referenced by the Respondents on p. 27 of their Brief, each had evidence; which at a minimum showed the existence of disputed facts.

Talley compiled a large appendix for his Appeal Brief to the Montana Supreme Court which showed a host of evidence; nearly all of which was either overlooked or disbelieved by the lower courts. For example:

A. Talley's affidavits, the testimony of a former Dean and President, as well as a Dean's memo produced by Talley show that

part-time instructors planned their teaching a year in advance.

B. Talley supplied the memo wherein the College offered grants of money for future quarters.

C. Talley introduced into evidence the deposition of the former Dean and President who testified as to the legitimate expectation of employment opportunity, and to the equivalent of a "promise" that he had made to Talley in that regard.

D. Talley introduced into evidence a letter to him from the FVCC Board of Trustees dated June 14, 1989, which stated:

> "The Board cannot guarantee you any continuation of employment. The administration will consider you for employment as a part-time instructor on a quarter by quarter basis as we consider others who have expressed a desire to serve as part-time

instructors.

This promise from the Board of Trustees to Talley that he would be treated equally along with other part-timers was broken; (equal protection). For Talley introduced into evidence a memo from Respondent Fryett to the Dean and the Department Chairman (as well as other documents) ordering them not hire Talley because he had not disavowed his beliefs and acknowledged something he did not believe, and because he had filed suit. (Talley included a charge of failure to hire based on having filed a lawsuit (under both state and federal law), but neither court took any notice, and granted summary judgment by their silence. On p. 3 of their Brief, the Respondents admit that, "Talley has not since been hired by the College."

E. As mentioned on p. 6, 7 of his Petition Talley contended that Respondent Fryett promised him employment for the Spring Quarter with a student petition (as well as for later quarters). Talley introduced into evidence the

depositions of several students who were involved in the successful petitioning and to whom the promises were made as well.

For this incident, the following from Sindermann, clearly applies:

> "Explicit contractual provisions may be supplemented by other agreements implied from the promisor's words and conduct in the light of the surrounding circumstances. And, the meaning of the promisor's words and acts is found by relating them to the usage of the past." Perry v. Sindermann, 408 US 593, 92 S.Ct. 2694, 34 L.Ed.2d., 570 (1972).

Additionally,

> "More recently, the Court has refused to limit constitutional 'property' rights to

> mere contract rights (citations omitted). Legitimate and reasonable reliance on a promise from the state can be the source of property rights protected under the Due Process Clause and Civil Rights Statutes." (Vail v. Board of Education of Paris Union School District No. 95, 706 F.2d 1435 (1983), Affirmed, 466 US 377, 80 L.Ed 2d 377).

CONCLUSION

In sustaining the award of summary judgment in this case, the Montana Supreme Court has held that part-time instructors at Montana's largest community college, whose efforts have accounted for approximately one half of the credits taught, even though they may have been

employed for twenty-five years, year round at 2/3 time (30 hours per week), can, if they happen to somehow offend the sentiments of some autocratic and vindictive administrator, be fired or not rehired, and irrespective of past practices or promises made regarding employment opportunities, have practically no recourse for justice or due process. And because of the way the case was decided, the rationale regarding property rights can be extended to all Montana workers.

This case is very complex. Even at the federal level, there are no less than twelve separate instances of alleged violations: denial of property rights in general; general and specific promises of

employment; two issues regarding free speech; another liberty issue regarding slander; three instances of denial of equal protection of the law; non-hiring for having filed a lawsuit; and specific refusal to grant a due process hearing. Not all of those issues could be brought before this Court at this time; even though many received summary judgment by silence (neither Court giving any indication that they were aware of them).

In Sindermann, supra, at 578, this Court held that the award of summary judgment against a college professor in a situation similar to this case was improper.

And in Peacock, (quoted more fully on p. 19 and 20 of the Petition) the Ninth

Circuit Court of Appeals wrote that:

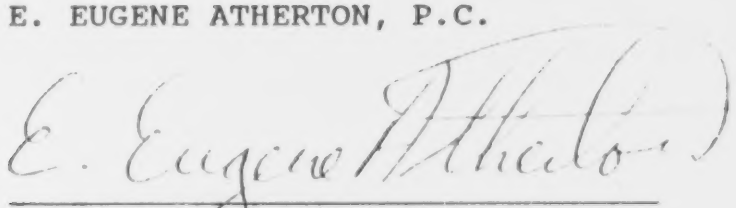
> "Summary judgment in cases such as this would mean that many instances of retaliatory firings might never reach the jury. Only a full trial can separate permissible motivations from those that merely hide unconstitutional behavior." (Peacock v. Duval (1982), 694 F.2d., 644, 648).

Wherefore: since the Montana Supreme Court, by denying Talley a trial, has denied him the opportunity to offer to the jury the evidence of his property rights as given in Sindermann and Vail, and since that Court as well as ignored this Court's interpretation of federal rules regarding summary judgment as given in Liberty Lobby and that of the Ninth Circuit Court of Appeals in Peacock, Talley respectfully requests this Court to grant certiorari and

conduct its own review of the record below.

Respectfully submitted this 16th day of December, 1993.

E. EUGENE ATHERTON, P.C.



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CERTIFICATE OF SERVICE

I, Brenda Hamblin, secretary to E. Eugene Atherton, do hereby certify that on this 16th day of December, 1993, I forwarded a true and correct copy of the foregoing PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION, by first class mail, postage prepaid, upon:

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Kalispell, Montana 59901

Attorney for Respondents

Clerk of Montana Supreme Court
215 North Sanders, Rm. 323
Helena, Montana 59620-3003

Honorable Michael H. Keedy
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Brenda Hamblin